***United States Court of Appeals***

***for the***

***District of Columbia Circuit***

# TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

4471

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21945

FRANK MACKLIN, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from a Judgment of Conviction of Carrying a Deadly Weapon after Conviction Of a Felony by a Jury in the United States District Court for the District of Columbia



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## INDEX AND TABLE OF AUTHORITIES



## TABLE OF AUTHORITIES

THIS CASE HAS NOT BEEN BEFORE THE COURT.

## QUESTIONS PRESENTED

1. The question is whether or not the United States District Court should have granted the motion to suppress the evidence of a gun as illegally seized from the appellant without probable cause.

2. The question is whether or not the motion to dismiss the indictment for the lack of a speedy trial should have been granted.

3. The question is whether the prosecution attempted to bring to the attention of the jurors matters not proper for their consideration, including (a) asking the appellant if a robbery complainant was brought in and asked to identify him, after the Court had ruled there would be no impeachment under the Luck doctrine; (b) asking the appellant if the police were attempting to pin a bum rap on him; (c) having three guns marked for identification in open court and displayed by the marshals in front of the jury; (d) having witnesses testify to taking guns from other parties than the appellant at the scene of the arrest when the appellant was the sole defendant in the case; (e) in the prosecutor walking around the courtroom in front of the jury repeatedly clicking the gun allegedly taken from the appellant; (f) in having police officers enter the rear of the courtroom and asking the appellant if these police officers showed him a gun; and (g) did the prosecutor in the closing argument argue facts not in evidence by stating an officer said he found a gun on another person found in the car with the

appellant, and stating the question is who you believe, to the jury, when the testimony showed the appellant said he saw no guns taken from anyone at the scene of his arrest.

## STATEMENT OF THE CASE

On January 20, 1967, at approximately 2:45 a.m., Officer Franck stopped a vehicle at Vermont and R Streets, N. W., for not stopping at a blinking red light. Previous to stopping the vehicle, the officer had head a look-out broadcast (MTr. Govt. Ex. 1-Transcript of Look-out) to be on the look out for two Negro males, one 25-30 years old, five feet ten, heavy built, dark complexioned, wearing dark hat, coat and dark trousers, and the other Negro male being 20-22, five feet five, medium build, wearing a brown jacket, armed with a pistol, last seen running south in the 1200 block of the Figure 8th Street, N. W.

The vehicle that Officer Franck stopped was a Cadillac with four occupants in it and the vehicle was heading west on R Street, N. W. The look-out broadcast further stated that one of the suspects was supposed to be named Freddie Wilson, who held up the complainant about a month earlier.

Officer Franck had the driver of the vehicle show him his license and then went back to his cruiser where he radioed for help and stated that he believed two of the occupants of the car fitted the description of the broadcast look-out he had just heard.

Thereafter another police cruiser arrived at the scene and a patrol wagon with Metropolitan police officers, and the three other occupants of the car were removed from the car.

The appellant was given a preliminary hearing on January 27, 1967 and was indicted on March 21, 1967.

The appellant filed motions to dismiss the indictment for lack of a speedy trial in August, 1967 and November, 1967 were denied. A motion for a trial date certain was filed January 26, 1968 and granted with the trial date set for February 26, 1968. The trial began on March 7, 1968. The motion to suppress the evidence was heard and denied on September 15, 1967.

Upon arriving at the scene at Vermont andR Streets, N. W., Private Hughes (TrB. 10) stated that he searched the appellant and found a gun on him, because he saw a gun taken from another passenger of the vehicle as he arrived at the scene. The prosecutor asked Officer Hughes (TrB. 17) if he had occasion to discover people in the car who had conducted a holdup and was answered in the negative. Thereafter, the prosecutor asked if there were any other guns taken off any other subjects while Officer Hughes was there, and objection was made and sustained to this question (TrB. 18).

The government had Exhibits 1 and 2 (gun allegedly taken from appellant and bullets) marked for identification, and the defense

(TrB. 18) stipulated that the appellant did not have a license to carry a gun in the District of Columbia on that date (TrB. 19).

Thereafter, the government rested and counsel approached the bench. The Court at the bench stated that we might as well take up the Luck issue. The government (TrB. 23) stated that it had no particular reason for the use of the appellant's prior conviction, so the Court stated that since there was no problem, the case would proceed.

The appellant took the stand and stated that he was in the car that was stopped for going half-way through a blinking red light. Appellant stated that the officer stopped them and the driver of the car went back to the police cruiser, while he and the other passengers sat in the car. The appellant stated thereafter two white police cars came up and the first thing he knew they were searched by the policemen. He stated they were told to get out of the car and put their hands on top of the car, and he was searched. Thereafter the appellant was asked by counsel (TrB. 30-31):

> Q. Now, you heard the officer state that he saw a gun being taken from somebody else in your presence-- What, if anything, did the officer take from you?
>
> A. They didn't take anything from me. I didn't see any gun until they took us down to No. 2 Precinct.
>
> Q. You did not see any gun?
>
> A. I didn't see any.

The prosecutor then cross-examined the appellant and asked the following (Trm. 6):

Q. Now, you say no guns were taken from you or anyone else that was in the car with you?

A. Not to my knowledge. There was nothing taken from me. I don't speak about anybody else there.

Q. But you didn't see any guns while you were there on the scene where the car was stopped?

A. I saw the policeman's gun that he had on me.

Q. But you didn't see any other gun sticking out of anybody's pocket, is that correct?

A. No, sir.

Thereafter, the government marked Exhibits 5, 5A, 6, 6A, 7 and 7A (TrM. 6) for identification, which were three guns and bullets. The defense counsel objected to the introduction of the pistols as being prejudicial, as two marshals attempted to break down the guns and clear them in open court in front of the jury. The prosecution at the bench stated that the guns were going to be used to impeach the appellant by showing that they were taken from two passengers in the vehicle with him.

The prosecution asked the appellant if he saw another passenger named Pendergraph being searched and the appellant replied that he had his hands on top of the car and couldn't see anything. There were too many police officers around and he was handcuffed (TrM. 9)

The appellant stated that he did not see anyone search the driver, Rufus Williams, and he did not see anyone search Marshall Butler, another passenger in the vehicle.

The prosecution asked the appellant again if he didn't testify on direct examination that the police didn't take any guns from any of the persons at the scene, and the appellant said that the only guns he saw were down at the No. 2 Precinct (TrM. 10).

The prosecutor then asked (TrM. 11):

Q. Now, you say the police didn't find a gun on you, that they just pinned a bum rap on you, is that right?

A. I said they didn't find a gun on me.

Q. Well, they just pinned a bum rap on you, is that right?

Mr. Winter: Your Honor, I object.

The Court: The objection is sustained.

By Mr. Lumbard:

Q. Where did that gun come from if it wasn't found on you?

A. I don't know.

The prosecution then asked where Marshall Butler, one of the passengers is today, and defense objected, and a bench conference was had (TrM. 12). Defense counsel stated that he was afraid a question like that might cause the appellant to state that Butler was sent to jail in connection with having a gun on him in the same incident.

The prosecutor then asked the appellant (TrM. 15):

Q. After you were arrested they brought in a robbery complainant and asked him if he could identify you, didn't they?

Defense counsel objected and the Court sustained it. At a bench conference (TrM. 16), the prosecution said that the basis of his question was to show that the appellant was taken before a complainant and the complainant did not identify him, and that the prosecution was trying to get at the fact that the tendency of the appellant's testimony was that the police tried to pin a bum rap on the appellant. The Court (TrM. 17-18) stated it was not going to permit any reference to be made to prior convictions of the appellant. The prosecutor then stated that he wanted to bring in the officers one by one and show them to the appellant and ask the appellant if he had ever seen these officers before and so on, and the Court said that if he were trying to get the same thing in in another way, the Court would not permit it (TrM. 18-19). Two officers were displayed in this way and the defense objected (TrM. 24).

The government stated that they were attempting to utilize four different officers to show what happened on the scene, and the Court again stated (TrM. 20) that unless the government had evidence to rebut the appellant's statement, or to impeach his statement that he didn't see the gun, the Court was not going to let the prosecution go further with the gun business, or into the question of what some other people did by way of identifying appellant, or not, with respect to another crime.

Thereafter, the prosecutor began to walk around the court clicking the gun in front of the jury and the defense counsel objected to this as being prejudicial (TrM. 21-22; TrM. 91).

The government in rebuttal called Officer Breedlove who related how he got the passenger Butler out of the vehicle and took a gun from him (TrM. 64). An objection was made to questioning the officers (TrM. 65) one by one concerning guns taken from other passengers. Officer Breedlove stated he didn't see any gun taken from appellant (TrM. 70). Officer Whited was then used as a rebuttal witness and testified how he searched a passenger Pendergraph in the vehicle and took a gun from him (TrM. 76) but he never saw the appellant being searched (TrM. 80).

A motion for a mistrial was requested (TrM. 81) on the grounds that the prosecutor in inadvertently taking the gun offered in evidence and walking around in front of the jury box and around in front of the table where the prosecution sat, while he was apparently thinking and at the same time clicking the gun, was highly prejudicial. A motion for mistrial was also requested (TrM. 86) in having the three guns taken from the other passengers in the vehicle and marked for identification and having a display by the marshals of cocking or breaking the guns and clearing them in front of the jury. A motion for mistrial was also made on the grounds that it was error (TrM. 87) to ask, "Do you think the police were pinning

a bum rap on you," and in asking the appellant if he was identified or asked to be identified in a lineup or at the precinct as an alleged robber in some robbery that took place.

In the closing argument, the prosecutor (TrM. 105) argued that Officer Breedlove searched a man who sat in the car next to the appellant and took him out of the car and found a gun on him, but the appellant said he didn't see any guns so the question is who you (the jury) believe.

## STATUTE INVOLVED

Title 22, District of Columbia Code, Section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed.

## SUMMARY OF ARGUMENT

The record clearly shows that the motion to suppress the seizure of a gun from the appellant on the grounds that it was made by an illegal search, should have been granted. The motion to suppress transcript contains an exhibit, namely, the look-out broadcast, which was so vague in connection with the description of two Negro males, that it could have fitted just about any Negro male in the District of Columbia. Furthermore the broadcast look-out had the Negro males running on foot, and not traveling in a Cadillac, and further, one of the names of the alleged robbers was given, so

there was no probable cause of searching the appellant who was a passenger in a vehicle which was stopped for a traffic violation.

The appellant was arrested on January 20, 1967 and was not tried until March of 1968, although he made two motions to dismiss for lack of a speedy trial, and finally a motion to set a date certain for trial. The burden was on the government to show that the undue delay was not prejudicial.

The government in prosecuting the case continuously over-prosecuted the case in a prejudicial manner before the jury, in having three guns openly displayed in front of the jury, which guns were not alleged to have been taken from the appellant, and in bringing on the officers to testify how they took these guns from other parties, not co-defendants in the case. The government further attempted to infer the appellant was a robbery suspect in asking the question concerning whether a robbery complainant was brought in and asked to identify the appellant. Furthermore, after the Court had ruled that there could be no impeachment under the Luck doctrine, such a question would certainly be prejudicial. The question of asking the appellant if the police were trying to pin a bum rap on him and having the three guns marked for identification in an open court and displayed by the marshals in front of the jury was prejudicial, since this conduct was such that would cumulate in the minds of the jury and infer a criminal disposition of the appellant from

the acts of others.

The testimony of the police officers that they found these guns on the other passengers in the vehicle was further prejudicial in tending to cumulate evidence and corroborate the carrying of a gun by the appellant, when no relationship exists therebetween and when no corroboration exists.

The bringing into the court, one by one, of the officers and displaying them to the appellant and asking the appellant if he were shown a gun by the officers, was also cumulative evidence and corroborative evidence inferring to the appellant a carrying of a gun when no such inference or relationship therebetween should be drawn. This same inference and prejudice occurred from the prosecutor walking around the courtroom in front of the jury inadvertently clicking the gun, allegedly taken from the appellant.

The prosecutor's rebuttal testimony by the officers of their taking guns from other passengers in the vehicle and in arguing in his closing argument that the jury had a choice of believing one of the officers who took one of the passengers out of the vehicle and took a gun from him, and believing whether or not the appellant did not see any guns taken from the passenger that the officer testified he took the gun from, was prejudicial, because there was no conflict in testimony, but they were separate and unrelated testimony concerning two unrelated facts. This same officer testified that he

did not see the appellant with a gun.

## STATEMENT OF POINTS

The Court below erred in not granting the motion to suppress the evidence as being based on an illegal search, and in not granting the motion to dismiss the indictment for lack of a speedy trial, and in not granting the motion for mistrial on the grounds that the prosecution attempted to bring to the attention of the jurors matters not proper for their consideration in rendering a verdict.

## ARGUMENT

I. Should the Motion to Suppress the Evidence as Being Based on an Illegal Search Have Been Granted, Where the Appellant was a Passenger in a Vehicle Stopped for a Traffic Violation?

The appellant contends that the Court below erred in overruling his motion to suppress the evidence because there was no probable cause for the police officer to search the appellant who was a mere passenger in a vehicle stopped for a traffic violation.

The appellant was committing no crime, the police officer did not see the appellant commit any crime in his presence, and the police officer merely had a broadcast look-out which reported two Negro males had committed a robbery and ran on foot in another direction while the appellant was riding along in a new Cadillac in the officer's direction. The description of the Negro males could have

fit the description of thousands of Negro males in the District of Columbia in January, 1967, and besides that the Cadillac had four occupants, and not two persons as alleged in the broadcast look-out.

It has been held that probable cause exists where:

> "The facts and circumstances within their (the officers) knowledge and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Brinegar v. United States, 338 U.S. 160, 175 (1949).

> Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. Henry v. United States, 361 U.S. 98, 102 (1959).

> A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged. Stacey v. Emery, 97 U.S. 642, 645 (1878).

The Supreme Court has said that while evidence which would establish the defendant's guilt in a criminal trial is not necessary in order to establish probable cause to arrest or search, yet "common rumor or report, suspicion, or even strong reason to suspect" will not suffice. Henry v. United States, 361 U.S. 98, 101 (1959); Brinegar v. United States, 338 U.S. 160, 175 (1949); Loche v. United States, 2 U.S. (7 Cranch) 560, 563-564 (1813).

Thus, since the broadcast look-out description did not support the circumstances of seeking the alleged robbers in a new Cadillac

and a group of four when only two were reported running on foot from the scene of the robbery, the search of the appellant lacked probable cause, and hence there was no basis for making a search of the appellant and the seizure of an alleged pistol from him. The search of the appellant was therefore illegal.

Since a search that is unlawful in its inception is not validated by what it turns up, Wong Sun v. United States, 371 U.S. 471, 484 (1963), then the motion to suppress should have been granted and any evidence obtained as a result of such search should have been suppressed. Miller v. United States, 357 U.S. 301, 312 (1958); Ker v. United States, 374 U.S. 23 (1963).

II. The Motion to Dismiss the Indictment for Lack of a Speedy Trial should Have Been Granted.

The appellant was arrested on January 20, 1967 and was not brought to trial until March 7, 1968, which was almost 14 months after his arrest. The appellant filed two motions for dismissal because of the undue delay and they were denied. The appellant furthere filed a motion to grant a trial date certain. The appellant did not cause this undue delay and it was through no fault of his.

In Ross v. United States, 121 U.S. App . D.C. 233; 349 F.2d 210 (1965), a seven-month delay in a narcotics case was held to be an undue delay. In the present case in which the delay was substantially longer than in Ross, had the appellant been convicted and received

the sentence which he did receive in the present case, he would have served it long before now, as the appellant was incarcerated for over a 13-month period awaiting trial. In Parrot v. United States, 24? Fed. Supp. 196, it was stated that alhtough there was no absolute test as what constitutes delay within the Sixth Amendment, where the delay in bringing criminal prosecution to trial is substantial, the prejudice may be presumed and it is the government's burden to show proof that no prejudice has been incurred. It is submitted that in the present case a 13-month delay is so substantial that such prejudice may be presumed, and the government has never met their burden of showing no prejudice has occurred, particularly in view of the fact that the appellant was incarcerated for a longer period preceding trial than he was actually sentenced.

III. The Prosecution Continuously Brought to the Attention of the Jurors Matters Not Proper for Their Consideration, and in So Doing Caused Prejudicial Error Which Improperly Affected and Influenced the Jury and Produced a Wrongful Conviction.

The appellant was on trial for carrying a deadly weapon, namely a gun, which was allegedly found on him after a search in which he was a passenger in a vehicle which had been stopped for a traffic violation. There were three other passengers in the vehicle and guns were found on two of the other passengers, according to the testimony. The Court ruled that the Luck doctrine prevailed, 121

U.S. App. D.C. 151, 340 F.2d 763 (1965). Nevertheless, the appellant was asked after this ruling if a robbery complainant was brought in and asked to identify the appellant, and the appellant was asked if the police were trying to pin a bum rap on him. Three guns were also marked for identification in open court before the jury and displayed by the marshals in clearing them in front of the jury. Police officers were brought in to testify, taking the guns from other parties at the scene of the arrest, when the appellant was thesole defendant on trial in the case. The prosecutor further walked around the courtroom in front of the jury repeatedly clicking the gun allegedly taken from the appellant, although this was done inadvertently. Thus, the jury was unduly influenced and although objections were made to some of this conduct, the cumulative effect and the corroborating effect of the evidence was unduly prejudicial.

In Gregory v. United States, 369 F.2d 185 (1966), it was pointed out that the danger with evidence with respect to two different acts is that they will cumulate in the jurors' minds and tend to prove a defendant guilty of both acts. Further, the evidence of one of the acts may be so weak that the primary usefulness of the other act is to support the government's case in the second act. It is submitted that this is what occurred in the present case.

With the testimony of the police officers concerning taking guns from the other passengers in the car, and the display of the guns allegedly taken from the other passengers, in front of the jury, was improperly brought to the attention of the jurors so that matters no proper for their consideration was secured by the jury. State v. Comes, 62 N.W.2d 753. Furthermore the sustaining of some of the objections by the Court were insufficient to ward off the danger entirely, because the damage had been done. Blumenthal v. United States, 332 U.S. 539 (1947).

The jury may use evidence of one crime to infer a criminal disposition of a defendant from which is found his guilt of another crime, or the jury may cumulate evidence of various crimes charged and find guilt when, if they were considered separately, they would not so find. Prejudice may also reside in the minds of the jury in a latent feeling of hostility engendered by the charging of several crimes, as distinct from only one. Thus, the constant testimony of the guns obtained from the other passengers and display of guns and asking of the appellant if police officers showed him a gun was prejudice in the minds of the jurors. Drew v. United States, 118 U.S. App. D.C. 15, 331 F.2d 89.

The evidence submitted in the present case of taking the guns from the other passengers in the vehicle and the reference to being

confronted with a robbery complainant to see if he would be able to identify the appellant, and the question of whether the appellant was having a bum rap pinned on him by the police, increased the likelihood that the jurors made an improper inference therefrom, and such actions were of such a nature that the jury might regard this as corroborative of the evidence presented solely with respect to the appellant and the police officer searching him, under Drew.

Although the prosecution attempted to utilize the evidence of the removal of guns from the other passengers in the vehicle and the identification of the guns taken from the other passengers as impeaching the credibility of the appellant, this never occurred. The prosecution further argued in the closing argument that the jury had a choice to believe the testimony of one officer who took a gun from a passenger in the vehicle next to the appellant, or the appellant's statement that he saw no guns taken from anyone at the scene of his arrest. This argument was totally outside of the testimony presented. Garris v. United States, U.S. App. D.C. No. 21,142, Feb. 14, 1963.

## CONCLUSION

For all of the reasons stated above, it is respectfully submitted that the lower Court erred in not granting the motion to suppress the evidence, and the motion to dismiss the indictment for lack

of a speedy trial, and the motion for a mistrial, and it is requested that this Court reverse said lower Court.

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BRIEF FOR APPELLEE

# United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. [illegible]

FRANK MACKLIN, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

[illegible]

DAVID G. [illegible],
*United States Attorney.*

FRANK Q. NEBEKER,
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[illegible]

# INDEX



## TABLE OF CASES



## OTHER REFERENCES

## ISSUES PRESENTED

In the opinion of appellee, the following issues are presented:

Do appellant's claims of error relating to speedy trial, unlawful search and prejudicial prosecutor conduct point up reversible error where

(1) the delay between arrest and trial was primarily caused by the processing of pre-trial motions initiated by appellant and his co-defendant,
(2) the police action leading up to appellant's search was not only reasonable but imperative, and
(3) the prosecutor conduct mentioned was either perfectly proper trial tactics or certainly not such as to prejudice the fairness of appellant's trial?

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This case has not previously been before this Court under the same or similar title.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 21,945

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FRANK MACKLIN, JR., APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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**Appeal from the United States District Court for the District of Columbia**

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## BRIEF FOR APPELLEE

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### COUNTERSTATEMENT OF THE CASE

In March 1968, appellant was tried before jury and Judge Joseph Waddy on a charge of carrying a dangerous weapon (pistol).[1] The jury found appellant guilty and Judge Waddy sentenced him to 4 to 12 months imprisonment. Appellant rests his call for reversal on claims relating to speedy trial, illegal search and prejudicial prosecutor conduct.

The facts material to the claims raised are the following. Appellant, along with three others, Pendergraph,

[1] 22 D.C. Code § 3204 (1967). The felony charge arose due to appellant's already having been convicted of a felony. See Information, filed by Government March 11, 1968.

Butler and Williams, was arrested on January 20, 1967, around 2:45 a.m. All except Williams were found to be carrying loaded pistols when arrested. Just prior to arrest all four were riding together in a car, Williams the driver. Williams was not indicted, apparently because he was not found in actual possession of a pistol. The three others were indicted in March 1967. Arraignment for all three was also scheduled for March, but Pendergraph and Butler failed to appear. Appellant entered a plea of not guilty with appointed counsel present and was remanded to jail. Pendergraph and Butler were picked up on bench warrants and committed to custody. Pendergraph moved for a mental examination and on April 21 was granted his request and committed to St. Elizabeths Hospital for a 60 day examination. On April 26 appellant filed a *pro se* motion to dismiss his indictment which was denied. Appellant at that point was represented by a new attorney who continued to represent him throughout the pretrial and trial proceedings and presently on appeal. On July 7 Pendergraph was found competent to stand trial after a hearing and after St. Elizabeths Hospital had filed a report to that effect. On August 3 the Government certified the case as ready for trial. On August 17 a second *pro se* motion by appellant for dismissal of his indictment, plus a motion to suppress evidence, was filed. On August 29 the indictment as to Butler was dismissed because he had previously been convicted of a Court of General Sessions misdemeanor charge arising out of the same incident. On September 15 motions to suppress evidence as to appellant and Pendergraph were heard by Judge John J. Sirica and denied. On September 19, pursuant to Pendergraph's petition, an independent psychiatrist was appointed to evaluate his mental condition. On December 1 another of appellant's motions to dismiss for lack of speedy trial was denied. On February 27 Pendergraph was granted a change of counsel and the court *sua sponte* severed his case from appellant's. Less than two weeks later appellant was tried and convicted.

At the September 15 pre-trial motion to suppress hearing, the Government produced the following evidence. Shortly after 2 a.m. on January 20, 1967, Officer Walter Franek was cruising the area around the 1300 block of 8th Street, N.W., pursuant to a lookout for a fresh robbery at 1306 8th Street. The lookout included a description of two Negro males, their height, build and skin shade, in their twenties, one wearing a dark full length coat, the other wearing a brown leather jacket, both armed. At 12th and R Streets, N.W., four or five blocks from the robbery scene, Officer Franek saw a car go through a flashing red light. He stopped the car, which had four Negro males in it, and going up to the car, noticed that the two males in the back seat appeared by their coats to match the robbery lookout. Recognizing that a common method of robbery operation was to run a ways on foot and then get a ride with waiting companions, and knowing that the lookout robbers were armed, Officer Franek acted as if he were conducting a routine traffic stop and asked the driver to come back to his patrol car and show him registration. While doing this, Officer Franek radioed for assistance for the possible robbery apprehension. Within moments assistance arrived. (Motion Tr. 7-25.)[2]

Officer Walter Whited was one of the officers who responded to Officer Franek's assistance call. He had seen the car in question parked close by minutes before in the heavy robbery zone, had decided to keep the car under surveillance, but had lost it. When he arrived to aid Officer Franek, three persons were still in the car, one was back with Officer Franek. The three were asked to step out of the car. When the two from the back seat, appellant was one, were lined up alongside the car, Officer

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[2] There are three separate transcripts in the record. The transcript of the motion to suppress hearing will be referred to as "Motion Tr.". The trial was transcribed by two different court reporters and their respective portions will be referred to by their last names, "Brockmeyer Tr." and "Maher Tr.".

Whited observed them start to go into their pockets.[3] They were then searched and a loaded pistol was found on each. (Motion Tr. 28-38.)

After the four were taken to the precinct, they were shown to the 1306 8th Street robbery victim, but he was unable to make any positive identification (Motion Tr. 26).

Appellant's counsel renewed his motion for dismissal of the indictment for lack of speedy trial, and was denied. (Motion Tr. 43-47.)

At trial, the Government's case-in-chief evidence was brief, consisting primarily of Officer Hughes' account of searching appellant and finding a loaded gun on him[4] (Brockmeyer Tr. 3-18). Appellant took the stand and testified that no gun was taken from him and that he did not see any guns taken from anyone else in the car (Brockmeyer Tr. 24-31). During cross-examination Government counsel introduced the other guns seized on January 20 (Maher Tr. 6). The guns were cleared by a marshal for safety reasons prior to being presented. Government counsel asked appellant if he was saying the police officers were "pinning a bum rap" on him (Maher Tr. 11). He also asked appellant if he had been viewed by a robbery victim when taken to the precinct (Maher Tr. 15). Appellant's counsel informed the court that Government counsel had been clicking the gun taken from appellant during his cross-examination. The court had not seen any such clicking. Government counsel told the court that if he had

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[3] A more detailed account of how the three from the car were searched was developed at trial by two officers who were not called to testify at the motion to suppress. Officer Bertrum Breedlove, who was on the scene for assistance, saw a gun bulge beneath Butler's sweater as he alighted first of the three from the car. Breedlove grabbed the gun and then found a second one in Butler's pocket. (Maher Tr. 63-64). Officer Eddie Hughes, also part of the assistance officers, learned that a gun had been taken from Butler and immediately searched appellant, finding a .38 six shot revolver, fully loaded, tucked in his belt (Brockmeyer Tr. 6, 10-11).

[4] See note 3, *supra*.

done it, it was inadvertent and apologized. (Maher Tr. 22, 90, 91).

On rebuttal, Government counsel presented the officers who had seized the other guns (Maher Tr. 63, 64, 76). In closing argument, Government counsel summed up briefly by saying the case turned on whether the jury believed Officer Hughes' account of getting the gun off appellant, corroborated by the testimony of the other officers, or appellant's account (Maher Tr. 105).

## ARGUMENT

### Appellant has pointed up no reversible error.

#### A. *Appellant's right to a speedy trial was not violated*

The violation of speedy trial predicate is unreasonable pre-trial delay accountable to the Government and prejudice to the presentation of an accused's case resulting.[5] Neither part is present in this case. The delay of 13 months between arrest and trial was due to no fault of the Government. Appellant's case was certainly properly tied to Pendergraph's at the outset, and all delay was due to the processing of pre-trial matters initiated by appellant and Pendergraph. No prejudice in the conducting of appellant's trial has been indicated. To the contrary, if anything, appellant was benefitted by virtue of the fact that one of his companions, Butler, became available to testify without self-incrimination problems due to the intervening Court of General Sessions disposition of his case.

#### B. *The search of appellant was reasonable and valid.*

Recent decisions of this Court and the Supreme Court have made it abundantly clear that police officers have an action flexibility in moving to investigate suspicious

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[5] *Hedgepeth* v. *United States*, 124 U.S. App. D.C. 291, 364 F.2d 684 (1966); *Hedgepeth* v. *United States*, 125 U.S. App. D.C. 19, 365 F.2d 952 (1966).

and potentially dangerous street situations so long as the actions taken are reasonable in terms of scope and occasion for exercise.[6] The events leading up to appellant's search are a prime example of good and prudent police work. Officer Franek on the basis of a lookout was patrolling for armed perpetrators of a fresh robbery. Within blocks and minutes of the robbery he saw a car go through a red light. Stopping the car, he saw two persons in the back who appeared to match the lookout description of the armed robbers. He called for assistance. Certainly it was reasonable to have the persons get out of the car for a closer look.[7] With nothing more, a search for weapons at that point would have been eminently reasonable.[8] With the officers' accounts of the first gun being seized because a gun bulge was seen and of appellant's going into his pockets, further search action became not only reasonable but imperative.[9]

### C. *Government counsel's conduct was proper and certainly did not constitute reversible error.*

Appellant points to several aspects of Government counsel's conduct of the trial which taken together allegedly constitute prejudicial error. The contention has no merit.

Questioning appellant as to whether he thought the police were "pinning a bum rap" on him and whether he was shown to a robbery victim were perfectly proper once appellant had testified so as to indicate if believed that

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[6] *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Allen* v. *United States*, —— U.S. App. D.C. ——, 390 F.2d 476 (1968); *Bailey* v. *United States*, 128 U.S. App. D.C. 354, 361, 389 F.2d 305, 312 (1967) (concurring opinion of Judge Leventhal); *Dorsey* v. *United States*, 125 U.S. App. D.C. 355, 372 F.2d 928 (1967).

[7] *Dorsey* v. *United States*, *supra* note 6.

[8] *Terry* v. *Ohio*, *supra* note 6.

[9] Any possible sham arrest inference is negatived by Franek's calling in for assistance regarding robbery suspects and the fact that appellant was later shown to the robbery victim.

the officers were lying or had acted in bad faith.[10] The presenting into evidence of the other guns seized was done only after appellant had said he saw no guns taken, implying that none were taken. As such going into the other guns was a perfectly proper impeachment tactic. The clearing of the guns by the marshal was a standard safety step and in no sense prejudicial.[11] Government counsel's inadvertent clicking of appellant's gun can not reasonably be viewed as constituting prejudicial error.[12] The closing argument credibility comparison between Officer Hughes and appellant was proper and accurate.

## CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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[10] The good faith of Government counsel in asking about the robbery victim is demonstrated by his efforts at the beginning of trial to avoid all reference to the robbery situation (Brockmeyer Tr. 5). In fact it was defense counsel who opened the robbery door during his cross-examination of Officer Hughes (Brockmeyer Tr. 12-13).

[11] See Maher Tr. 90-91.

[12] *Cf., Miller* v. *Pate*, 386 U.S. 1 (1967).

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